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Supreme Court, U.S.
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SUPREME COURT, U.S.

NO. 93-1500

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

DEWEY SOWDERS, WARDEN, PETITIONER,

V.

CLAUDE EARN CARTER, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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APRIL 14, 1994

30 pp

QUESTION PRESENTED

WHERE THE ACCUSED IS FREE ON PRE-TRIAL BOND AND ALL LOWER COURTS HAVE AGREED HE DID NOT HAVE NOTICE OF A PRE-TRIAL DEPOSITION OF THE COMMONWEALTH'S KEY WITNESS, CAN THE ACCUSED'S ABSENCE FROM SAID DEPOSITION EQUAL WAIVER OF HIS CONSTITUTIONAL RIGHT OF CONFRONTATION?

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	-i-
TABLE OF AUTHORITIES	-iii-
OPINION BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTORY PROVISIONS INVOLVED	2-3
COUNTERSTATEMENT OF THE CASE	3
REASONS FOR DENYING THE WRIT	9
I. THIS COURT LACKS JURISDICTION TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT BECAUSE THE COMMONWEALTH'S PETITION FOR WRIT OF CERTIORARI FAILED TO COMPLY WITH THE REQUIREMENTS OF SUPREME COURT RULE 14(1)(h) AND 14(5)	9
II. BY FAILING TO OBJECT TO THE MAGISTRATE JUDGE'S REPORT FINDING THAT RESPONDENT DID NOT HAVE NOTICE OF THE DEPOSITION, THE COMMONWEALTH OF KENTUCKY HAS WAIVED ITS RIGHT TO CHALLENGE THAT FINDING OF FACT BEFORE THIS COURT IN ITS PETITION FOR WRIT OF CERTIORARI	13
CONCLUSION	18
APPENDIX	

TABLE OF AUTHORITIES

PAGE

CASES

Carter v. Commonwealth, Ky., 782 S.W.2d 597 (1989)..... 6

Carter v. Sowders, 5 F.3d 975 (6th Cir. 1993)..... 1, PASSIM

Cracker v. Procunier, 756 F.2d 1212 (5th Cir. 1985)..... 15

Crosby v. United States, 113 S.Ct. 748 (1993)..... 13

Praylow v. Martin, 761 F.2d 179 (4th Cir. 1985)..... 13

Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985)..... 14, PASSIM

United States v. Schronce, 727 F.2d 91 (4th Cir. 1984)..... 15-16

OTHER AUTHORITIES:

Sixth Amendment, United States Constitution.....2

Fourteenth Amendment, United States Constitution.....2

28 U.S.C. §636..... 3, PASSIM

28 U.S.C. §1254..... 1

28 U.S.C. §2254..... 1, PASSIM

Supreme Court Rule 14..... 9, PASSIM

Federal Rule of Criminal Procedure 43..... 13

Rule 8 of the Rules Governing §2254 Cases..... 15

Kentucky Rule of Civil Procedure CR 76.04..... 13

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Claude Earn Carter, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported as Carter v. Sowders, Ky. 5 F.3d 975 (6th Cir. 1993), and is attached as part of the respondent's appendix (Appendix hereinafter A 1-8).

JURISDICTION

Respondent contests petitioner's assertion that this Court has jurisdiction over petitioner's petition under 28 U.S.C. §2254(1), and respondent further states that this Court lacks jurisdiction over petitioner's petition under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him;...and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides:

> ...No State shall...deprive any person of life, liberty, or property, without due process of law[.]

STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2254(d) provides:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed correct,....
>
> * * *
>
> And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7),

> inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

28 U.S.C. §636(b)(1) provides:

> (B) a judge may also designate a magistrate...to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court,...of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.
>
> * * *
>
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

COUNTERSTATEMENT OF THE CASE

On December 27, 1985, the Logan County, Kentucky, Grand Jury

indicted respondent, Claude Earn Carter, for unlawfully possessing more than eight (8) ounces of marijuana on November 5, 1985, for purposes of sale; selling more than eight (8) ounces of marijuana on November 3, 1985; possessing and selling LSD on November 3, 1985; possessing drug paraphanalia; and being a first degree persistent felony offender. (Transcript of Record, hereinafter TR I (Indictment No. 85-CR-072) 1-2). Respondent was arraigned on January 17, 1986, and trial was set for April 24, 1986. (TR I 4).

On March 4, 1986, the Commonwealth of Kentucky, petitioner herein, moved to take a videotape deposition of Charles Elam, Jr., a paid police informant and the key witness against respondent. (TR I 8-9). No specific ground for taking the deposition was given. (Id.). On March 17, 1986, the Commonwealth filed a second motion to depose Elam. (TR I 12-13). Since Elam was a Tennessee resident, it was necessary - according to the prosecutor - for the Commonwealth to depose him now as it lacked the power to ensure his attendance at respondent's trial in Kentucky on April 24, 1986. (Id.). After a hearing on April 2, the Logan Circuit Court sustained the prosecutor's motions to depose Elam. (TR I 13, 26).

On April 14, 1986, the prosecutor subpoenaed three (3) Kentucky Police Officers to appear at respondent's April 24th trial. (TR I 27-29). No subpoena was issued for Elam, nor were any other efforts made to secure his attendance. On April 23, 1986, respondent's trial was continued until September 25, 1986. (TR I 30). The next day, the prosecutor filed an ex parte petition, pursuant to Tennessee's Uniform Non-Resident Witness Act,

to secure the attendance of Elam for purposes of deposing him on May 15, 1986. (TR I 31-32). The trial court granted the Commonwealth's petition the following day. (TR I 33-34).

No deposition was taken on May 15, 1986. Instead, the Commonwealth filed another ex parte petition, this time pursuant to Oklahoma's Uniform Non-Resident Witness Act, to secure Elam's presence in Kentucky for a deposition on June 30, 1986. (TR I 35-36). The trial court granted the Commonwealth's petition on the same date. (TR I 37-38).

On June 5, 1986, the Commonwealth wrote respondent's attorney notifying him that Elam's deposition would be taken on June 30, 1986 and stating the "deposition will be read at [respondent's] trial" in September. (TR I 39). The deposition was held as scheduled on June 30, 1986, in the Office of the Commonwealth's Attorney. (Transcript of Deposition for Plaintiff, hereinafter TDP 2). Respondent's attorney appeared at the deposition, but respondent did not. (TDP 3). Counsel stated he didn't receive the notice of the deposition until June 20, 1986. Counsel wrote to respondent on that date advising him "you may wish to be present" at the deposition and made other efforts to contact respondent, all to no avail. (TDP 3-5).

There is no evidence in the record that respondent ever received this letter or any other notice of the deposition, or that he was aware his counsel would not remain for the deposition if he did not show up at the deposition. Since respondent testified at trial, and the Commonwealth cross-examined respondent, the

Commonwealth had the opportunity to specifically question him on this matter. However, the Commonwealth failed to avail itself of this opportunity.

The trial court specifically found there was "no evidence that [respondent] had notice that he was suppose [sic] to be there [at the deposition]." (TE IV 346).

At trial the Commonwealth introduced, over respondent's objection, Elam's uncross-examined deposition testimony taken in the absence of respondent and his counsel. Based on this deposition, which was the sole evidence of respondent's guilt, the jury found respondent guilty of possession of marijuana over eight ounces and trafficking in LSD and being a first degree persistent felony offender. (TR II 51-56, 58-62).

Respondent appealed his convictions to the Kentucky Supreme Court on the grounds that the introduction of Elam's deposition at his trial violated his state and federal constitutional rights to confrontation, counsel and presence. (TR II 90-94, 96). The Commonwealth did not file a cross-appeal to challenge the trial court's finding that respondent did not have notice of the deposition. CR 76.04. On September 28, 1989, the Kentucky Supreme Court affirmed respondent's substantive convictions but reversed his first degree persistent felony offender conviction due to insufficient evidence. Carter v. Commonwealth, Ky., 782 S.W.2d 597, 602 (1989). The Kentucky Supreme Court denied respondent's petition for rehearing on February 8, 1990.

On May 8, 1990, respondent filed a petition for a writ of

certiorari in this Court, raising the same federal constitutional violations, which was denied on June 28, 1990.

On December 28, 1990, Respondent filed a petition for a writ of habeas corpus in the federal district court pursuant to 28 U.S.C. §2254 alleging the aforementioned federal constitutional violations. On September 3, 1991, the magistrate judge filed his report recommending the petition for writ of habeas corpus be denied. However, in his report, the magistrate judge presumed correct, pursuant to 28 U.S.C. §2254(d), the Kentucky trial court's finding that there was no evidence that respondent ever received the letter of his attorney advising him of the deposition. Petitioner's Appendix, hereinafter PA 46. Respondent filed objections to the magistrate judge's report on September 19, 1991. The Commonwealth did not file any objections to the magistrate judge's report. More specifically, the Commonwealth did not object to the magistrate judge's presumption of correctness as to the Kentucky trial court's finding that there is no evidence in the record that respondent received notice of the deposition. Id.

On November 1, 1991, the district court, stating it had considered de novo those portions of the magistrate judge's report to which respondent Carter had objected, accepted the magistrate judge's report "in whole" and denied the petition for a writ of habeas corpus.

After the district court denied respondent's Application for a Certificate of Probable Cause, respondent filed a motion to alter or amend judgment which was also denied. Respondent then filed a

Motion for a Certificate of Probable Cause in the United States Court of Appeals for the Sixth Circuit which was granted on April 15, 1992.

In a unanimous decision, the United States Court of Appeals for the Sixth Circuit reversed the decision of the district court and granted respondent's petition for a writ of habeas corpus. The Sixth Circuit specifically held that "[b]ecause [respondent] did not waive his constitutional rights under the Confrontation Clause to confront his accuser and subject his testimony to cross-examination, the deposition did not bear adequate indicia of reliability for admission at trial." Carter v. Sowders, 5 F.3d 975, 976, 982 (6th Cir. 1993); PA 2, 26. The Sixth Circuit specifically stated that "[t]he [Kentucky] trial court found that there was no evidence that [respondent] ever received the letter from his attorney concerning the deposition, and that finding is presumed correct. 28 U.S.C. §2254(d)." Id. at 981; PA 21.

Notwithstanding the findings of the Kentucky trial court, the magistrate judge, the district court and the United States Court of Appeals for the Sixth Circuit, the Commonwealth filed a petition for rehearing based on the clearly erroneous assumption that respondent received notice of the deposition. In its December 16, 1993, Order denying the petition for rehearing, the Sixth Circuit stated:

> The entire thrust of the petition is that [respondent] Carter had notice of the deposition used in substitution for live testimony at Carter's criminal trial and that Carter knowingly waived his right of

> confrontation. This one point is repeated time and again for fifteen pages. The problem with this repeated point is that the record demonstrates that it is simply factually inaccurate, as our previous opinion concludes, and as the state trial judge flatly found as a fact. Carter v. Sowders, supra at 982; PA 28-29.

The Commonwealth's petition for writ of certiorari is likewise based on the assumption, which is contrary to the record evidence, that respondent received notice of the deposition.

REASONS FOR DENYING THE WRIT

I.

> THIS COURT LACKS JURISDICTION TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT BECAUSE THE COMMONWEALTH'S PETITION FOR WRIT OF CERTIORARI FAILED TO COMPLY WITH THE REQUIREMENTS OF SUPREME COURT RULE 14(1)(h) and 14(5).

A. Failure to Comply with Supreme Court Rule 14(1)(h)

The Commonwealth's petition for writ of certiorari asks this Court to review the judgment of the United States Court of Appeals for the Sixth Circuit in the case of Carter v. Sowders, 5 F.3d 975 (6th Cir. 1993). This Court lacks jurisdiction to review this judgment from the United States Court of Appeals for the Sixth Circuit because the Commonwealth failed to comply with the requirements of Supreme Court Rule 14(1)(h).

Under Supreme Court Rule 14(h), the party seeking review in this Court of a judgment "shall" specify all stages of the

proceedings at which the federal question it seeks to be reviewed was raised, how it was raised, and how the courts below ruled upon the question, including specific references to the record to show "the federal question was timely and properly raised."

At no point in its statement of the case does the Commonwealth specify when the federal question it asks this Court to review was presented to either the Kentucky trial court, the Kentucky Supreme Court, the federal district court for the Western District of Kentucky, or the United States Court of Appeals for the Sixth Circuit; nor does the Commonwealth state the "method or manner" this question was raised or how this question was passed upon by either the trial or appellate courts.

Accordingly, this Court lacks jurisdiction to review the judgment of the United States Court of Appeals for the Sixth Circuit because the Commonwealth failed to comply with Supreme Court Rule 14(h).

B. Failure to Comply with Supreme Court Rule 14(5)

This Court lacks jurisdiction to review this judgment from the United States Court of Appeals for the Sixth Circuit because the Commonwealth failed to comply with the requirements of Supreme Court Rule 14(5).

Under Supreme Court Rule 14(5), "[t]he failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration will be a sufficient reason for denying the petition."

The Commonwealth's rendition of the facts in its "Question Presented," Statement of the Case, and Reasons for Granting the Writ is inaccurate because it omits the finding of fact by the Kentucky trial court, that was presumed correct pursuant to 28 U.S.C. §2254(d) by the United States District Court for the Western District of Kentucky and the United States Court of Appeals for the Sixth Circuit, that respondent Carter did not have notice he was required to appear at the deposition. PA 21, 45-46. As the United States Court of Appeals for the Sixth Circuit states in its Order denying petitioner's petition for rehearing:

> The entire thrust of the petition is that [respondent] had notice of the deposition used in substitution for live testimony at [respondent's] criminal trial and that [respondent] knowingly waived his right of confrontation. This one point is repeated time and again for fifteen pages. The problem with this repeated point is that the record demonstrates that it is simply factually inaccurate, as our previous opinion concludes, and as the state trial judge flatly found as a fact. The state trial judge found that there is no evidence that [respondent] failed to show for the deposition in this case. There is no evidence that he had notice he was supposed to be there.... Carter v. Sowders, supra at 982; PA 28-29.

The Commonwealth's "Question Presented" assumes respondent had notice of the deposition. But since all courts below have found that respondent did not have notice of the deposition, this Court need not decide how or whether or under what standard respondent could make a knowing an intelligent waiver of something of which he

had no knowledge.

In addition, the Commonwealth omits from its Statement of the Case that the magistrate judge presumed correct the Kentucky trial court's finding that there was no evidence in the record that respondent had notice of the deposition. Petition for Writ of Certiorari, hereinafter PC 9-10; PA 45-46. Likewise, the Commonwealth omits from its Statement of the Case that the United States Court of Appeals for the Sixth Circuit presumed correct the trial court's finding "that there was no evidence that [respondent] ever received the letter from his attorney concerning the deposition." PC 10-11; PA 21.

Then, in the very first sentence of its Reasons for Granting the Writ, the Commonwealth states: "The focus of this petition is whether a criminal defendant who is free on pre-trial bond waives the right to confrontation by not attending a deposition of which he/she has notice." PC 11-12. The Commonwealth goes on to state that "[a]fter being notified of a court-ordered deposition, respondent neither contacted his attorney, nor appeared at the deposition." PC 13-14. The Commonwealth continues its misstatement of the facts when it states: "Having determined respondent was aware of the scheduled deposition...." PC 22.

This Court must proceed to a decision on the basis of the actual facts in the record of the case at bar. Once this Court takes into consideration the actual facts of this case, the Commonwealth's "Question Presented" becomes a hypothetical question because it is not based on the fact situation in the instant case.

Even if this Court were to look at petitioner's hypothetical question presented, said question has already been decided adversely to petitioner in Crosby v. United States, 113 S.Ct. 748, 753 (1993), holding that Federal Rule of Criminal Procedure 43 "prohibits the trial in absentia of a defendant who is not present at the beginning of trial." "[T]he defendant's initial presence serves to assure that any waiver is indeed knowing." Id., 113 S.Ct. at 752.

Accordingly, this Court should deny the Commonwealth's petition for writ of certiorari because the Commonwealth failed to comply with Supreme Court Rule 14(5) by accurately presenting the facts of this case to this Court.

II.

BY FAILING TO OBJECT TO THE MAGISTRATE JUDGE'S REPORT FINDING THAT RESPONDENT DID NOT HAVE NOTICE OF THE DEPOSITION, THE COMMONWEALTH OF KENTUCKY HAS WAIVED ITS RIGHT TO CHALLENGE THAT FINDING OF FACT BEFORE THIS COURT IN ITS PETITION FOR WRIT OF CERTIORARI.

The Kentucky trial judge found "[t]here's no evidence that [respondent] failed to show for the deposition in this case. There's no evidence that he had notice that he was suppose [sic] to be there." (TE IV 346). The Commonwealth of Kentucky did not challenge, in the Kentucky trial court or the Kentucky appellate court, this finding of the trial judge. CR 76.04.

In his report, the magistrate judge stated "the trial court found that there was no such evidence [that respondent had notice of the deposition] and that finding is presumed correct. 28 U.S.C.

§2254(d)." PA 46. The Commonwealth of Kentucky did not file objections with the district judge to this portion of the magistrate judge's report.

28 U.S.C. §636(b)(1) states that any party may file written objections to the magistrate's report within ten days after being served with a copy of the report. A party may file objections if it is aggrieved by any aspect of the magistrate judge's report. A party need not be aggrieved by the magistrate judge's recommended disposition to file objections. "Congress apparently assumed ...that any party who was dissatisfied for any reason with the magistrate judge's report would file objections and those objections would trigger district court review." (emphasis added). Thomas v. Arn, 474 U.S. 140, 106 S.Ct. 466, 473, 88 L.Ed.2d 435 (1985). To avoid waiver, a party must object specifically to proposed magisterial findings. Praylow v. Martin, 761 F.2d 179, 180 n.1 (4th Cir. 1985). This waiver rule applies equally to the Commonwealth (who received a favorable recommendation from the magistrate judge) as well as the criminal defendant (who received an unfavorable ruling from the magistrate judge). Id. Failure to file specific objections constitutes a waiver of any further right of appeal. Thomas v. Arn, supra, 106 S.Ct. at 471.

In the case at bar, the Recommendation of the Magistrate Judge contained the following Notice: "Failure of a party to file timely objections shall constitute a waiver of the right to appeal by that party." PA 48-49. The magistrate's warning even cited Thomas v. Arn, supra. Id. This language was mandatory and explicitly

alerted the Commonwealth to its procedural obligations. See United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984).

"The filing of objections to a magistrate's report enables the district judge to focus attention on those issues - factual and legal - that are at the heart of the parties dispute." Thomas v. Arn, supra, 106 S.Ct. at 471. By failing to object to the factfinding of the magistrate judge, which was then adopted "in whole" by the district court, the Commonwealth waived its right to have the district court make a "de novo determination" of that aspect of the magistrate judge's report, i.e., whether respondent received notice of the deposition. 28 U.S.C. § 636(b)(1); Rule 8(b)(4) of the Rules Governing §2254 cases.

In its unanimous opinion reversing the decision of the district court and granting respondent's petition for writ of habeas corpus, the United States Court of Appeals for the Sixth Circuit stated that "[t]he trial court found that there was no evidence that [respondent] ever received the letter from his attorney concerning the deposition, and that finding is presumed correct. 28 U.S.C. §2254(d)." Carter v. Sowders, supra at 981; PA 21.

Under 28 U.S.C. §2254(d) a state court's determination of a factual issue shall be presumed to be correct. This presumption of correctness applies equally to state factfindings favorable to the state as well as the prisoner seeking relief. Craker v. Procunier, 756 F.2d 1212, 1213-1214 (5th Cir. 1985). The burden rests upon the party challenging the state court factfinding "to establish by

convincing evidence that the factual determination by the State court was erroneous." 28 U.S.C. §2254(d). In the case at bar, at no time has the Commonwealth made any effort to establish with any evidence, convincing or otherwise, that the finding of the Kentucky trial court is erroneous.

The Commonwealth would have this Court believe that the burden is on respondent to show that a ruling in respondent's favor is correct. For example, in its petition for writ of certiorari, the Commonwealth states that "[r]espondent has never been required to offer any explanation, compelling or otherwise, for his absence [;....] At a minimum, the Sixth Circuit should have allotted the burden to respondent to prove lack of notice as this was a habeas corpus proceeding [;.... T]he most to which respondent was entitled was a hearing[1] in federal district court to give him yet another opportunity to explain why he did not attend Elam's deposition and why he failed to contact his attorney." PC 23-25. The Commonwealth's statements ignore that respondent testified at trial and thus the Commonwealth had every opportunity to question respondent about whether he received notice of the deposition. Instead, the Commonwealth, contrary to the facts in the record, repeatedly asserts that respondent had notice of the deposition.

In its Order denying the Commonwealth's petition for rehearing, the United States Court of Appeals for the Sixth Circuit

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[1]. Respondent asked for a hearing in his memorandum of authorities in support of his petition for writ of habeas corpus, but the Commonwealth, in its answer and response to respondent's petition, moved to dismiss or in the alternative for summary judgment.

stated:

> The entire thrust of the petition is that [respondent] had notice of the deposition used in substitution for live testimony at [respondent's] criminal trial and that [respondent] knowingly waived his right of confrontation. This one point is repeated time and again for fifteen pages. The problem with this repeated point is that the record demonstrates that it is simply factually inaccurate, as our previous opinion concludes, and as the state trial judge flatly found as a fact....Carter v. Sowders, supra at 982; PA 28-29.

Just as in its petition for rehearing, the entire thrust of the Commonwealth's petition for writ of certiorari is that respondent "had notice of the deposition used in substitution for live testimony at [his] criminal trial." Id. Because the Commonwealth never objected to the Kentucky trial court's finding of fact that respondent did not have notice of the deposition, nor to the magistrate judge's report presuming this historical fact to be correct, the Commonwealth has waived its right to have this Court review by writ of certiorari its "Question Presented" which assumes, as a condition precedent, that respondent had notice of the deposition.

Accordingly, since the Commonwealth has waived its right to challenge the factfinding of the Kentucky trial court, this Court must deny the Commonwealth's petition for writ of certiorari. Thomas v. Arn, supra.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

The least well-defined element of a *Rumery* analysis is the consideration of whether enforcement of the agreement will "adversely affect the relevant public interests." *Id.* at 398, 107 S.Ct. at 1195. The majority justices in *Rumery* suggested that this standard can be satisfied if the prosecutor demonstrates that obtaining the release was motivated by an independent, legitimate criminal justice objective. *Id.* at 398, 401–02, 107 S.Ct. at 1195, 1196–97. This does not appear to create a particularly difficult hurdle for the prosecutor to clear. Indeed, the reason proffered by the prosecutor for the release-dismissal agreement in this case—"to aid in the disposition of its heavy case load"—would probably suffice under ordinary circumstances. *See id.* at 401, 107 S.Ct. at 1196 (O'Connor, J., concurring in part and in the judgment) (citing "allocation of criminal justice resources" as a "legitimate criminal justice" concern).

[5, 6] Release-dismissal agreements also can be legitimate criminal justice tools in situations where police misconduct is alleged, but the prosecutor is genuinely unable to ascertain the truth surrounding the allegation. As the Ninth Circuit noted in *Lynch v. City of Alhambra*, 880 F.2d 1122 (9th Cir. 1989), release-dismissal agreements can allow prosecutors to "achieve a rough substantial justice where the 'true' facts of the case are not known" by "allow[ing] everyone to declare the case a draw and go home." *Id.* at 1127 n. 8. Examples of other legitimate criminal justice objectives that come to mind are situations where the cost of prosecution would outweigh the benefit accruing to the public from a conviction; where the strength of evidence of criminal conduct is doubtful even though charges were filed in good faith; where witnesses or evidence are no longer available; where evidence is subsequently discovered that points to the criminal case defendant's innocence; or where criminal charges are not the product of prosecutorial misconduct and both sides benefit substantially from a balanced settlement in the sense that both avoid exposure to potential liabilities and expenses.

Rumery also requires a court reviewing a release-dismissal agreement to weigh or balance the interests on both sides of the issue of enforceability. *Rumery*, 480 U.S. at 392, 107 S.Ct. at 1191; *id.* at 399, 107 S.Ct. at 1195 (O'Connor, J., concurring in part and in the judgment). Therefore, in a case where there existed substantial evidence of police misconduct, a court reviewing the release-dismissal agreement could conclude that the public's interest in vindicating constitutional rights and deterring police misconduct[3] by permitting a specific civil complaint to go forward, despite a release, outweighs a general prosecutorial interest in helping to manage a heavy case load.

III.

For the foregoing reasons, the judgment of the district court is **reversed** and this cause is **remanded** for further proceedings consistent with this opinion. The district court should also reconsider plaintiff's motions to amend his complaint should it conclude that the release is not a bar to plaintiff's action.

Claude Earn CARTER, Petitioner–Appellant,

v.

Dewey SOWDERS, Warden, Northpoint Training Center, Respondent–Appellee.

No. 91–6419.

United States Court of Appeals, Sixth Circuit.

Argued April 23, 1993.

Decided Sept. 27, 1993.

Order Denying Rehearing Dec. 16, 1993.

Federal habeas corpus petitioner's conviction for possession of marijuana and traf-

3. *E.g., Lynch*, 880 F.2d at 1128.

ficking in LSD was affirmed on direct appeal by the Supreme Court of Kentucky, 782 S.W.2d 597. Defendant's petition for writ of habeas corpus was denied by the United States District Court for the Western District of Kentucky, Ronald E. Meredith, Chief Judge. Appeal was taken. The Court of Appeals, Merritt, Chief Judge, held that: (1) admitting videotaped deposition of paid police informant violated petitioner's Sixth Amendment rights; (2) unavailable witness exception to hearsay rule did not apply; and (3) petitioner did not waive right to confrontation by failing to attend deposition or by counsel's appearance at beginning of deposition.

Reversed and petition granted.

1. Habeas Corpus ⇐842

District court's refusal to grant habeas petition is reviewed de novo.

2. Habeas Corpus ⇐846

District court's factual determinations in habeas corpus proceedings are reviewed under clearly erroneous standard.

3. Habeas Corpus ⇐765.1

Court of Appeals defers to state court findings when reviewing decision in federal habeas corpus proceedings if supported by evidence. 28 U.S.C.A. § 2254.

4. Criminal Law ⇐662.30

Admitting video deposition of paid police informant violated defendant's right to confront witness where deposition was taken in absence of both defendant and counsel, and deposition was only evidence supporting conviction. U.S.C.A. Const.Amend. 6.

5. Criminal Law ⇐662.30

Confrontation clause precluded application of unavailable witness exception to hearsay rule to use of videotaped deposition of paid police informant absent other adequate indicia of reliability; informant was not forced to confront defendant as deposition was given and was not subjected to cross-examination. Ky.Rules of Evid., Rule 804; Fed.Rules Evid.Rules 804, 804(a)(5), 28 U.S.C.A.; U.S.C.A. Const.Amend. 6.

6. Criminal Law ⇐662.80

Defendant did not waive right to confront paid police informant by failing to attend informant's videotaped deposition in absence of evidence that defendant received notice of deposition, was informed of constitutional right to attend, urged to exercise that right, or received notice of consequences of failure to appear. U.S.C.A. Const.Amend. 6.

7. Attorney and Client ⇐91

Evidence that defendant consented to not attend videotaped deposition of paid police informant was required to waive right to confront informant, even if defense counsel waived right by appearing and then departing. U.S.C.A. Const.Amend. 6.

Julie Namkin (argued and briefed), Dept. of Public Advocacy, Frankfort, KY, for petitioner-appellant.

Carol C. Ullerich, Asst. Atty. Gen. (argued and briefed), Chris Gorman, Atty. Gen., Frankfort, KY, for respondent-appellee.

Before: MERRITT, Chief Judge; and KEITH and SUHRHEINRICH, Circuit Judges.

MERRITT, Chief Judge.

Claude Earn Carter appeals the denial of his petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner was convicted of possession of marijuana and trafficking in LSD. Central to his conviction was the testimony of Charles Elam, Jr., a paid police informant. Elam's video deposition was taken in the absence of both petitioner and his counsel, and the deposition was later admitted, over petitioner's objection, at trial. Because petitioner did not waive his constitutional rights under the Confrontation Clause to confront his accuser and subject his testimony to cross-examination, the deposition did not bear adequate indicia of reliability for admission at trial. We therefore reverse the district court and grant the petition.

I.

Charles Elam was a salaried narcotics agent with the Dyersburg, Tennessee Police Department, earning $150/week. According to Elam's deposition testimony, Elam and Billy Driskell purchased marijuana and LSD from petitioner at a house trailer in Kentucky on November 3, 1985, and returned to Tennessee. Elam then took a group of Tennessee police officers to Kentucky and showed them the trailer where the drugs were purchased. The trailer was searched under warrant November 5, and Carter was arrested while working in the fields near the trailer. He denied ownership of marijuana found in the trailer, or that he had ever met Elam.

Carter was indicted by the Logan County, Kentucky, Grand Jury on December 27, 1985 for the drug offenses and for being a first degree persistent felony offender. He was arraigned January 17, 1986, and the trial was set for April 24 of that year. In preparation for trial, the Commonwealth moved March 4 to take a videotape deposition of Elam, giving no specific ground. A second motion was filed March 17, this time alleging that a pretrial deposition was necessary, since the Commonwealth could not secure the attendance of Elam, a Tennessee resident, at Carter's trial in Kentucky. The court granted the motion. On April 14, the Commonwealth subpoenaed three Kentucky police officers to appear at Carter's trial ten days later. No subpoena was issued for Elam, nor were other efforts made to secure his attendance. On April 23, Carter's trial was continued from April 24 to September 25, 1986. The next day, the Commonwealth filed an ex parte petition, pursuant to Tennessee's Uniform Non-Resident Witness Act, to secure the attendance of Elam for the purpose of deposing him May 15, 1986. The court granted the petition within a day. There was no deposition on May 15. Instead, the Commonwealth filed another ex parte petition, this time pursuant to Oklahoma's Uniform Non-Resident Witness Act, to secure Elam's presence in Kentucky to depose him June 30. The petition was granted the same day.

On June 5, the prosecutor wrote Carter's counsel, Louis Waller, notifying him of Elam's deposition on June 30 and stating that the "deposition will be read at [Carter's] trial" in September. According to Waller's statement at the June 30 deposition, he did not receive the notice until June 20. He then sent a letter to Carter, informing him of the deposition and stating "you may wish to be present." Waller received no response to the letter or to several subsequent phone calls made prior to the deposition. The trial court specifically found there was "no evidence that [Carter] had notice that he was suppose [sic] to be there."

The deposition was held as scheduled June 30. Waller appeared, but told the prosecutor that he could not effectively represent Carter without his presence. He further indicated that he intended to withdraw from the case. He then left the deposition, but not before pointing out to the prosecutor that if Elam could be compelled to come to Kentucky for a deposition, there was no reason why he could not be present for trial in September. The prosecutor proceeded to depose Elam in the absence of petitioner and his counsel, and without any cross-examination. Two days after the deposition, the Commonwealth moved for a ruling on the admissibility of the deposition at trial in lieu of live testimony.

In preparation for the new September 25 trial date, the Commonwealth issued subpoenas for seven witnesses September 8. Elam was not among them. The court having granted Waller's motion to withdraw, new counsel was appointed for Carter September 9. The following day, the court continued the trial to January 5, 1987. Approximately one week later, Carter's new counsel moved to quash Elam's deposition, on the grounds that Carter was denied his constitutional right to confront his accuser at the deposition. The motion was not denied until trial, almost four months later.

On December 18, 1986, less than three weeks prior to trial and more than five months after Elam's deposition, the prosecutor wrote Elam in Oklahoma notifying him of the new trial date and stating he "would like for [him] to come back to Kentucky in order to testify in person." On the same day, the

prosecutor wrote the Logan Circuit Court Clerk, asking that a subpoena be issued for Elam. The letter to Elam was returned to the prosecutor because of an expired forwarding order, and the subpoena was issued bearing the same address, but was not served. The prosecutor made a one-minute phone call to Oklahoma December 26, a four-minute phone call to Union City, Tennessee December 31, and four days prior to trial, on January 2, 1987, nine phone calls to Oklahoma lasting a total of sixteen minutes, in an effort to locate Elam.[1]

The trial commenced January 6, 1987. Immediately prior to trial, Carter's counsel stated on the record that although his motion to quash Elam's deposition had been argued, it had not been transcribed, and he reiterated his objections to its admission. He argued that the absence of Carter at Elam's deposition denied him his right to confront his accuser. He also emphasized to the court that the Commonwealth had used the Uniform Non-Resident Witness Act to procure Elam's attendance at his deposition, but had not made a similar effort to obtain his presence at trial. The motion was overruled and the deposition was read as the Commonwealth's first witness. One of the police officers also testified concerning what Elam had told him prior to taking them to Kentucky to show them the trailer. The trial court overruled petitioner's objection to introduction of this hearsay testimony.

The jury found Carter guilty of possession of marijuana and trafficking in LSD, and of being a first degree persistent felony offender. Carter appealed. The Kentucky Supreme Court upheld his substantive convictions, but reversed his first degree persistent felony offender conviction due to insufficient evidence. *Carter v. Commonwealth*, 782 S.W.2d 597, 602 (Ky.1989). After his petition for writ of certiorari to the United States Supreme Court was denied, 497 U.S. 1029, 110 S.Ct. 3282, 111 L.Ed.2d 791 (1990), Carter filed a petition for writ of habeas corpus in the district court, which was denied November 1, 1991. Carter filed a Motion for Certificate of Probable Cause in this Court March 10, 1992, which we granted April 13, 1992.

II.

[1–3] Petitioner's claims on appeal all revolve around Elam's testimony. Petitioner asserts that the prosecutor's decision to continue Elam's deposition after the departure of petitioner's attorney denied him his Sixth Amendment right to counsel, and his right under the Fifth, Sixth and Fourteenth Amendments to be present at all critical stages of the proceeding against him. Petitioner further contends that the failure of the trial court to suppress the deposition at trial violated his Sixth Amendment right to confront his accuser, due both to the Commonwealth's lack of a good-faith effort to obtain Elam's presence at trial and due to the inherent unreliability of a deposition not subjected to cross-examination. Finally, he asserts the admission of Elam's hearsay statements through the officer's testimony at trial was reversible, not harmless, error. We review de novo a district court's refusal to grant a habeas petition, and the district court's factual determinations are reviewed under the clearly erroneous standard. *McCall v. Dutton*, 863 F.2d 454, 459 (6th Cir.1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1744, 104 L.Ed.2d 181 (1989). We defer to state court findings if supported by the evidence. *Lundy v. Campbell*, 888 F.2d 467, 469 (6th Cir. 1989), *cert. denied*, 495 U.S. 950, 110 S.Ct. 2212, 109 L.Ed.2d 538 (1990).

The Sixth Amendment on its face guarantees a criminal defendant the right "to be confronted with the witnesses against him." The Supreme Court has recognized that this language "comes to us on faded parchment ... with a lineage that traces back to the beginnings of Western culture." *Coy v. Iowa*, 487 U.S. 1012, 1015, 108 S.Ct. 2798, 2800, 101 L.Ed.2d 857 (1988). "The Confrontation Clause provides two types of protection to the criminal defendant: the right physically to face those who testify against him, and the right to conduct cross-examination." *Pennsylvania v. Ritchie*, 480 U.S. 39, 51, 107 S.Ct. 989, 998, 94 L.Ed.2d 40 (1987).

1. The phone bill listing these calls appeared in the prosecutor's Motion to Supplement, filed one month after Carter's trial. The identities of the parties called were not given.

Both protections are crucial. "There is something deep in human nature that regards face-to-face confrontation between accused and accuser as 'essential to a fair trial in a criminal prosecution.'" *Coy*, 487 U.S. at 1017, 108 S.Ct. at 2801 (quoting *Pointer v. Texas*, 380 U.S. 400, 404, 85 S.Ct. 1065, 1068, 13 L.Ed.2d 923 (1965)). Similarly, the Confrontation Clause "forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth,'" *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 1935, 26 L.Ed.2d 489 (1970) (quoting 5 J. Wigmore, Evidence § 1367, (3d ed. 1940)).

Against this backdrop, the absence of Carter's counsel during Elam's deposition demands close scrutiny. As the Supreme Court stated in *United States v. Cronic*, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984):

> [I]f counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable.... The Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.

Id. at 659 & n. 25, 104 S.Ct. at 2047 & n. 25. In *Green v. Arn*, 809 F.2d 1257 (6th Cir.), *vacated on other grounds*, 484 U.S. 806, 108 S.Ct. 52, 98 L.Ed.2d 17 (1987), *reinstated*, 839 F.2d 300 (6th Cir.1988), *cert. denied*, 488 U.S. 1034, 109 S.Ct. 847, 102 L.Ed.2d 979 (1989), this court had the opportunity to apply *Cronic* in a situation where defense counsel absented himself from petitioner's trial while the prosecution was presenting its case. Counsel for two other defendants in the case was present, and conducted cross-examination of the state's first witness. Nevertheless, we found that petitioner's rights under the Confrontation Clause had been violated by the absence of her counsel during this critical stage of the proceeding:

> It is difficult to perceive a more critical stage of a trial than the taking of evidence on the defendant's guilt.... The absence of counsel during the taking of evidence on the defendant's guilt is prejudicial per se and justifies an automatic grant of the writ "without any opportunity for a harmless error inquiry." *Siverson v. O'Leary*, 764 F.2d 1208, 1217 [& n. 6] (7th Cir.1985).

Id. at 1263.

[4, 5] This case is similar to *Green*. It is undisputed that Elam's videotaped testimony was the sole evidence supporting Carter's conviction for the drug offenses of November 3, 1985. Although Lt. Ken Rieger was present to be cross-examined at trial, his information concerning the November 3 transactions came entirely from discussions with Elam. He did not travel to Kentucky until November 5. The taping of the deposition was, for all practical purposes, the only time "evidence on the defendant's guilt" was taken. The unmitigated absence of cross-examination at this time meant that Elam's testimony was never subjected to "the crucible of meaningful adversarial testing," *Cronic*, 466 U.S. at 656, 104 S.Ct. at 2045. Of course, *Green* is distinguishable on its facts; the absence of Green's counsel occurred at trial, rather than at a pre-trial deposition. We do not explicitly extend today the holding in *Green* to cover pre-trial depositions as well as trials, however similar the impact on the defendant's Confrontation Clause rights. But our reasoning in *Green* supports our conclusion here that Elam's videotaped deposition was hearsay, and was improperly admitted under the "unavailable witness" exception, Ky.R.Evid. 804 (Baldwin 1992).[2]

2. Ky.R.Evid. 804 states in relevant part:

> Hearsay exceptions: declarant unavailable
>
> (a) Definition of unavailability. "Unavailability as a witness" includes situations in which the declarant:
>
> . . . .
>
> (5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means.
>
> . . . .
>
> (b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:
>
> (1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken

Ky.R.Evid. 804 is substantially identical to Fed.R.Evid. 804, lacking only the residual hearsay exceptions permitted by subsection (5) of the federal Rule. In *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), the Supreme Court set forth the standard to be applied in defending this hearsay exception against Confrontation Clause claims:

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

Id. at 66, 100 S.Ct. at 2539. In *Barber v. Page*, 390 U.S. 719, 724–25, 88 S.Ct. 1318, 1321–22, 20 L.Ed.2d 255 (1968), the Court articulated the burden which must be met by the Commonwealth to satisfy the "unavailability" prong of the foregoing test: "a witness is not 'unavailable' . . . unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." The test for review of compliance with this standard defies precise explication: "The lengths to which the prosecution must go to produce a witness . . . is a question of reasonableness." *Ohio v. Roberts*, 448 U.S. at 74, 100 S.Ct. at 2543 (citing *California v. Green*, 399 U.S. at 189, n. 22, 90 S.Ct. at 1951, n. 22 (concurring opinion)).

We find it unnecessary to reach the issue of whether the Commonwealth's attempts to secure Elam's attendance at trial satisfy the good-faith effort test enunciated in *Barber*, however, because we hold that Elam's deposition, taken in violation of Carter's rights under the Confrontation Clause, could not satisfy the "other adequate indicia of reliability" standard imposed by the unavailable witness exception to the hearsay rule. Elam was not forced to confront Carter as he gave his deposition. He was not cross-examined. These circumstances could not provide the trier of fact with "a satisfactory basis for evaluating the truth of the prior statement." *Dutton v. Evans*, 400 U.S. 74, 89, 91 S.Ct. 210, 219, 27 L.Ed.2d 213 (1970).

[6] The Commonwealth argues that the *Ohio v. Roberts* test is met in this case because Elam's deposition was admitted under a "firmly rooted hearsay exception," 448 U.S. at 66, 100 S.Ct. at 2539, namely Ky.R.Crim.Proc. 7.20(1), which provides in relevant part:

> At the trial or upon any hearing, a part or all of a deposition, *so far as otherwise admissible under the rules of evidence*, may be used if it appears: . . . that the witness is out of the Commonwealth of Kentucky, unless it appears that the absence of the witness was procured by the party offering the deposition; or . . . that the party offering the deposition had been unable to procure the attendance of the witness by subpoena.

(emphasis supplied). This argument is without merit. As the emphasized portion of the preceding text shows, the rule governs production of evidence *subject to* the rules of evidence. Hearsay evidence from unavailable witnesses is governed by Ky.R.Evid. 804(b)(1), which includes the requirement that the party against whom the testimony is now offered had a prior "opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." But this is the very opportunity that was denied to Carter. The requirements of the exception are not met.

The Commonwealth contends that Carter waived his Sixth Amendment rights through his failure to attend the deposition after his attorney sent him written notice and tried to contact him several times by phone. It is not clear why this assertion, if true, would overcome the reliability problem with the deposition. Furthermore, we disagree with the premise. Waiver of the right to confront

> in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

one's accuser is evaluated according to the standards for waiving any constitutional right as enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938), and requires "an intentional relinquishment or abandonment of a known right or privilege." The right "may be waived only by voluntary and knowing action." *Boyd v. Dutton*, 405 U.S. 1, 2–3, 92 S.Ct. 759, 759–761, 30 L.Ed.2d 755 (1972). The trial court found that there was no evidence that Carter ever received the letter from his attorney concerning the deposition, and that finding is presumed correct. 28 U.S.C. § 2254(d). Furthermore, the letter, even if received, did not inform Carter of his constitutional right to attend, nor did it urge him to exercise that right ("you *may* wish to be present") (emphasis supplied). Most importantly, the letter did not provide Carter with any notice of the consequences if he failed to appear—that his attorney would leave the deposition and permit the state's key witness to be deposed without any cross-examination whatsoever. Although a waiver may be implied and not express, there must be evidence in the record to support that implication. This court's statement in *Evans v. United States*, 284 F.2d 393 (6th Cir.1960) is directly applicable: "the record does not show that defendant knew or was advised of his rights. In order to constitute a waiver, there must be a voluntary relinquishment of a *known* right." *Id.* at 395. We find Carter did not personally waive his right to confront Elam.

[7] The district court found that Carter nonetheless effected a waiver of this right through the actions of his attorney, who appeared for the deposition and then departed. We find this conclusion inconsistent with *Zerbst*. As the Second Circuit stated in *United States v. Crutcher*, 405 F.2d 239, 243 (2d Cir.1968), *cert. denied*, 394 U.S. 908, 89 S.Ct. 1018, 22 L.Ed.2d 219 (1969), referring to defense counsel's decision to proceed with jury impanelling in the defendant's absence: "[E]ven assuming [counsel] had the authority to act as Payne's counsel, he would not have the ability to bind Payne to a decision of this type without obtaining Payne's consent." The Tenth Circuit came to a similar conclusion in *Larson v. Tansy*, 911 F.2d 392, 396 & n. 2 (10th Cir.1990):

> The record indicates defendant's counsel, and not defendant, waived defendant's right of presence at trial. The trial court never directly addressed defendant concerning his counsel's request to conduct the remainder of the trial in defendant's absence. We hold that defendant did not waive his right to be present.... Even if defense counsel could have validly waived defendant's right to be present for the conclusion of his trial, where defense counsel did not consult with defendant concerning the waiver and did not obtain defendant's consent, the waiver will not be binding on defendant.

We similarly find that, even if Waller's actions at the deposition could constitute a waiver of the defendant's rights under the Confrontation Clause, the waiver would not bind Carter in the absence of a showing that he consented.[3] As the Supreme Court stated in *Faretta v. California*, 422 U.S. 806, 819, 95 S.Ct. 2525, 2533, 45 L.Ed.2d 562 (1975): "It is the accused, not counsel, who must be 'informed of the nature and cause of the

3. The Kentucky Supreme Court found that "Carter's right to confront Elam at the deposition was waived" because "[a]mple notice of the deposition was provided to Carter's counsel ... There was no evidence that Carter, personally, had a legal reason why he was unable to attend, and no proof that his presence would have made a difference." *Carter*, 782 S.W.2d at 599. This obviously conflicts with our reading of *Zerbst*. Moreover, the Kentucky Supreme Court made statements in an opinion decided the same day, *Dean v. Commonwealth*, 777 S.W.2d 900 (Ky.1989), that would lead to precisely the opposite result from that reached in *Carter*:

> We hold that because the right to be present and to confront is personal to the accused under Section 11 of the Kentucky Constitution, and more particularly under [Ky.R.Crim.Proc.] 7.12, only the defendant can waive this right. The waiver must be sufficiently clear "as to indicate a conscious intent." *Powell v. Commonwealth*, 346 S.W.2d 731, 734 (1961).... [A]ppellant's counsel waived appellant's right to be present at the depositions of the two prosecution witnesses. There is no indication in the record that it was appellant's conscious intent to waive this right and his consequent right to cross-examination. Counsel's waiver being ineffective, there was no waiver.... Appellant was not present; nor was he afforded the right to confront and cross-examine the witnesses called to testify against him.

Id. at 903. We can discern no reason why a different standard was used in deciding Carter's fate.

accusation,' who must be 'confronted with the witnesses against him'.... The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails."

We address finally the argument advanced by the Commonwealth that our ruling today will give every defendant's lawyer the power to obtain habeas relief for a client, merely by neglecting to inform the client of opportunities to confront his accusers. We rejected this argument in *Martin v. Rose*, 744 F.2d 1245 (1984), and see no reason to depart from our reasoning in that case:

> [W]e are unwilling to assume that members of the bar will cold-bloodedly adopt [such a] bizarre and irresponsible stratagem.... If such a tactic develops, the trial court must respond, but it is not helpless before an attorney's [tactics].... [T]he court's contempt power or the disciplinary mechanism of the bar may be appropriately invoked.

Id. at 1251–52.

III.

Carter had the right to confront Elam, his accuser. Denial of that right without a valid waiver rendered Elam's deposition unreliable for purposes of admissibility at trial over a hearsay objection. Because Carter's conviction was based solely on Elam's testimony, the error was not harmless. We therefore REVERSE the decision of the district court, and GRANT the petition for writ of habeas corpus.

ORDER

Dec. 16, 1993.

The Kentucky Attorney General's petition to rehear this habeas appeal is denied. The entire thrust of the petition is that petitioner Carter had notice of the deposition used in substitution for live testimony at Carter's criminal trial and that Carter knowingly waived his right of confrontation. This one point is repeated time and again for fifteen pages. The problem with this repeated point is that the record demonstrates that it is simply factually inaccurate, as our previous opinion concludes, and as the state trial judge flatly found as a fact. The state trial judge found that there is no evidence that [Carter] failed to show for the deposition in this case. There is no evidence that he had notice he was supposed to be there. This Court is not empowered to set aside the reasonable factual findings of the Kentucky trial court, undisturbed by the state appellate courts. Thus the only significant evidence at Carter's criminal trial was a deposition of Carter's chief accuser, a deposition Carter had no notice of. Under the Confrontation Clause live testimony subject to cross-examination is required in order to convict in such a case.

Accordingly, the petition to rehear is DENIED.

FIRST AMERICAN NATIONAL BANK, Plaintiff–Appellant,

v.

FIDELITY & DEPOSIT COMPANY OF MARYLAND, Defendant–Appellee.

No. 92–6163.

United States Court of Appeals, Sixth Circuit.

Argued June 24, 1993.

Decided Sept. 28, 1993.

Declaratory judgment action was brought to recover under employee fidelity policies. The United States District Court for the Western District of Tennessee, Odell Horton, Chief Judge, granted judgment for insurer. Appeal was taken. The Court of Appeals, Boyce F. Martin, Jr., Circuit Judge, held that takeover of insured bank and coverage under employee fidelity policies terminated automatically before occurrence under exclusion clause, which terminated coverage immediately upon taking over of insured by another institution, when another bank assumed management control of insured bank after purchasing 80% of insured bank's stock at public foreclosure sale.

Affirmed.

1. Contracts ⇐176(1)
Federal Courts ⇐776

Contract interpretation is a question of law and is subject to de novo review.

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Mr. William K. Suter
Clerk of the Court
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

RE: 93-1500
Sowders v. Carter

Dear Mr. Suter:

Enclosed please find the original and one copy of the Respondent's Brief in Opposition to the Petitioner's Petition for Writ of Certiorari in the above-styled case.

Very truly yours,

Julie Namkin

Julie Namkin
Assistant Public Advocate

JN/byh

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